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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 22-00168 WHO
)	
MIKLOS DANIEL BRODY,)	
)	
Defendant.)	
)	

San Francisco, California
Thursday, February 16, 2023

TRANSCRIPT OF PROCEEDINGS

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United States District Court - Official Reporter

Thursday - February 16, 2023

9:54 a.m.

P R O C E E D I N G S

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THE CLERK: This Court is now in session. The Honorable William H. Orrick presiding.

THE COURT: Good morning, everybody. Please be seated.

(Pause in proceedings.)

THE CLERK: We are here in case number 22-168, United States versus Miklos Daniel Brody.

Counsel, if you would please, come forward and state your appearance for the record.

MR. HAGEMAN: Good morning, Your Honor, George Hageman and Lauren Harding for the United States.

THE COURT: Good morning.

MR. KROTOSKY: Good morning, Your Honor, Mark Krotosky of Morgan Lewis on behalf of Mr. Brody who is present out of custody.

THE COURT: Good morning.

MR. DAVIS: Good morning, Your Honor, Robert Davis and Batya Forsyth for First Republic Bank.

THE COURT: Great. Good morning to all of you. Let me tell you how we are going to proceed this morning.

I'm going to give you my tentative on the motions to dismiss and the motions to suppress. I'm going to then give

1 you each 15 minutes to address whatever it is in those -- in
2 that tentative or in those motions that you think is most
3 important, and then we will move on to the motion to compel.

4 I have some direct questions that I want to ask of the --
5 of First Republic and then I will give you each 15 -- after I
6 get the answers to those things, I will give you each 15
7 minutes.

8 So let me tell you -- I will give you my tentative on the
9 motions. With respect to the motion to dismiss Count Two, it
10 doesn't appear to me to be duplicitous.

11 There is one violation of Section 1030(a)(5)(A) with two
12 elements, transmission and damage. The acts of transmission
13 are not distinct elements, and a different means of violating
14 the statute does not mean that they are distinct offenses.

15 And I don't see any case law to the contrary. I don't
16 think *U.S. v. Aguilar* is on point there. The statute stated
17 two distinct offenses and was duplicitous on its face.

18 I also -- I don't think specific unanimity is required.
19 The theories of liability are not the same as different
20 elements or offenses. I will look at -- you can raise this
21 again at the final instruction conference. If there is
22 something in the evidence that makes me think that I'm thinking
23 about this incorrectly, I will look at it again; but I'm -- at
24 the moment I just don't see it.

25 With respect to the motions to -- the *Franks* motion, again

1 I'm inclined to deny that motion. I don't see a material
2 misrepresentation or misleading statement nor that anything was
3 recklessly made.

4 The UDID diagram was illustrative of how the user name and
5 UDID were tied together. So failure to include the date and
6 time isn't material, and it wasn't used to prove access by
7 Mr. Brody.

8 The affidavit, I think, lays out the timeline on
9 March 11th and 12th; and there is no substantive preliminary
10 showing regarding the UDID diagram or statements that they were
11 made recklessly.

12 I think the same -- my same thought process applies to the
13 subsequent activity statements. The IP address was associated
14 with the residence. And whether he, Mr. Brody, used it or not,
15 the association supports Agent Foss's good-faith belief that
16 probable cause existed for the search. The IP address was used
17 44 times between 7:43 p.m. on March 11th and March 12th.

18 And then whether others were online or not doesn't impact
19 the probable cause that existed for the search in my view, so
20 stating that wasn't necessary.

21 With respect to the motion to suppress the evidence
22 seized, again, I would deny it. I think there is a nexus
23 between the residence and the computers and the electronic
24 device. The police report that Mr. Brody made was suspicious
25 enough to support the search for the items that were alleged

1 stolen. I don't -- I don't find that this was a stale search
2 because the digital devices wouldn't be affected by the passage
3 of time. I don't think the warrant was overbroad.

4 It seems sufficiently particular and the scope of the
5 search doesn't -- wouldn't support suppression. And in any
6 event, I think the good-faith exception would apply.

7 So that's the -- that's my view on those motions. So,
8 Mr. Krotosky, please proceed.

9 **MR. KROTOSKY:** Thank you, Your Honor.

10 I would like to turn first to the motion to suppress. We
11 believe that the allegations in the affidavit, looking solely
12 at the four corners of the affidavit, that they establish
13 essentially that Mr. Brody was a suspect.

14 It was one year earlier that they knew what his target
15 residence was and that the IP address one year earlier does not
16 connect at all to the residence.

17 Now, what's important about the IP address is that it does
18 not connect also to FRB. So its activity -- it is like having
19 a telephone and there is a telephone record, and there is no
20 calls made during the time of the offense; but there is calls
21 made before or after.

22 And so here we believe that the IP address that was listed
23 that is associated clearly does not show a connection to the
24 FRB network.

25 So if you take that out, if you remove that fact by

1 focusing on what it shows -- because it essentially says that
2 there is no nexus or a computer activity at the residence. The
3 only thing they have is the IP address and -- but it is before
4 and after the intrusion. So there is nothing, you know, else
5 at the residence.

6 So what that leaves is that Mr. Brody was a suspect. And,
7 you know, they had their reasons for whatever they thought; but
8 under the *Ramos* case, being a mere suspect does not allow for
9 the search of a residence including the contents of that
10 residence.

11 The other cases that are cited including the *Kvashuk* case
12 that the Government relies on had more specificity and a nexus
13 or justification to the residence.

14 So the only thing that shows any activity is the IP
15 address. The state in itself says not during. It is before
16 and after and then, you know, whatever the association is,
17 which is not stated.

18 What that means is that one year before Mr. Brody was
19 known to have resided at that location and he is a suspect, but
20 there is nothing that shows that there is likely to be evidence
21 that will be found, you know, at the residence.

22 The --

23 **THE COURT:** Why wouldn't that be the logical place
24 where the devices would be? If they weren't at his place of
25 work, which they weren't because he was no longer there, where

1 else -- where else would they be?

2 **MR. KROTOSKY:** Well, you know, an IP address can
3 connect at a coffee house, at a library, at any location.

4 **THE COURT:** Sure.

5 **MR. KROTOSKY:** But there's -- again, he is a suspect
6 and you need more. It's not one year later that, you know, the
7 material would still be there at that time.

8 So it's a very thin inference and one that -- you know,
9 the concern is the comparable search warrants like this where
10 an individual is a suspect and where they are charged with
11 Computer Fraud and Abuse Act means that the Government can just
12 go into their residence one year later without any nexus or
13 justification. And so for that reason we think that, you know,
14 the suppression is warranted.

15 Now, with respect to the particularity, we did cite to *Koh*
16 and other cases where -- there is a whole line of cases
17 including in *Koh* where they talk about seizing computers and
18 records, just a broad search. And that's basically what we
19 have here because in the items to be seized, attachment B, the
20 first paragraph just says "go grab data." And there is nothing
21 about the bank. There is nothing about time. There is
22 nothing -- there is no particularity at all.

23 And it just says "seize all computer systems, digital
24 storage media, iPhones and other, you know, items."

25 The first time any name is mentioned is in the fourth

1 paragraph of items to be seized where it references Mr. Brody
2 and it says the supposed automobile burglary; but there is
3 nothing to guide the agents on this.

4 Now, here is what is important is in the Government's
5 opposition they did provide some affidavits including of
6 Special Agent Pritchard and she says: "I was familiar with the
7 case. I had already been debriefed on it, and I was aware of
8 the circumstances;" and she was the lead agent during the
9 search and "when we went in, we found the Route 66 keys."

10 Now those are mentioned in the San Francisco police
11 report. They are not mentioned in the affidavit. So this
12 shows that the agents are using external factors -- nothing
13 that is guiding their discretion -- in the search on what they
14 are going to seize and so -- but on the particularity
15 requirement, you know, as we set forth, there is also the child
16 porn search, which clearly was not authorized. The Fourth
17 Amendment is violated as soon as the search is run.

18 And here --

19 **THE COURT:** The fact that nobody looked at it doesn't
20 bother -- is irrelevant as far as you are concerned. So the
21 way that the Government looks at the computers in every case
22 would be a violation of the Fourth Amendment; is that right?

23 **MR. KROTOSKY:** It is, Your Honor, because the search
24 occurs in the operation of the program. That's what is very
25 important.

1 Now, you can have a further search and seizure by looking
2 at it but more importantly as Mr. Vasiliou says in his
3 declaration, there are other ways to obtain the volatile data,
4 which is what they were looking for. You don't have to violate
5 the Fourth Amendment to obtain this.

6 They have other tools and other means to do it but this
7 task force officer apparently is accustomed to doing it in this
8 manner. So, we do think that's a very significant, you know,
9 issue that stands out; but on the particularity, we think the
10 line of cases that we cited are very similar and they go back
11 for many decades. And there is no particularity -- there is no
12 names mentioned. The bank is not even mentioned. There is no
13 dates mentioned, nothing to guide the discretion, you know, of
14 the searching officers other than what they are aware of as
15 they admit in the declaration.

16 And that's very troubling that a search warrant would be
17 obtained without any guidance. And so we do think that those
18 cases, you know, do control with respect to the particularity
19 requirement.

20 Then on the *Leon* exception, again, we believe that there
21 are three separate bases. The Government has the burden to
22 establish the *Leon* exception.

23 There is the facially deficient -- again, Special Agent
24 Pritchard admits in her declaration she is aware of other
25 factors. She is not being constrained or guided by the search

1 warrant affidavit. She is being directed by these other
2 factors that she is aware of the case.

3 And so we believe that that does establish -- that the
4 exception does not apply there. We also believe it is lacking
5 in indicia of probable cause because one year later the only
6 thing is they know where he lives based on police report, based
7 on his known employment address. The IP address is before and
8 after. There is no nexus to the residence.

9 So what this search warrant basically says, it violates
10 the *Ramos* holding and the other cases which do specifically
11 require a nexus and justification. And each of those cases, as
12 we cited in our brief, do set forth IP addresses or known views
13 of the individuals at the residence or seeing them at the
14 residence as well. And none of that is here.

15 And so this search warrant would stand for the proposition
16 that if you are a suspect and you are charged with the Computer
17 Fraud and Abuse Act, one year later the Government may be able
18 to break the door and go and seize, you know, all of the data.

19 I will move on then to the *Franks* motion. And with
20 respect to the *Franks* motion, we believe that a -- by a
21 preponderance of the evidence, a substantial showing has been
22 made that the affidavit recklessly or intentionally either
23 omitted facts or made material misrepresentations.

24 Now, paragraph 11 is the UDID paragraph. It is the only
25 one that mentions UDID. It provides one ten days -- eleven

1 days before the search, and it cuts off the information.

2 We believe that a magistrate judge would want to know is
3 this the only UDID that you have? And why is it -- does it
4 predate the search?

5 Now, as you said, Your Honor, it is illustrative and
6 that's the misleading component is because it presumes that
7 each and every other computer activity in the search warrant
8 affidavit is backed up by a UDID and it is not because there is
9 one on -- there is none on March 11th, and there is one on
10 March 1st, and there is one on March 12th.

11 The problem with the March 12th one, the Government relies
12 on the telephone record which has the same UDID, which is for
13 the iPhone 6. And that should show up on the phone record and
14 that does not. And, again, that is another significant red
15 flag and discrepancy that the magistrate judge should have been
16 made aware of.

17 So, with all of that information, you have a UDID that
18 predates the search -- I'm sorry -- that predates the offense,
19 and then you have a node of UDIDs on March 11th including --
20 for this illustrative example in paragraph 11 -- it says at
21 7:16 p.m. there is no UDID for that. It just doesn't exist.
22 And then there is one on March 12th, but it is inconsistent
23 with other evidence.

24 Based with those facts, a magistrate judge could have
25 exercised independence and asked, you know, "what do you have

1 that connects any devices to the bank, you know, for this?"

2 So the failure to include that information was, you know,
3 misleading we believe at best.

4 Now, with respect to the computer activity, the
5 allegations say Brody did A, B, C, whatever the computer
6 activity is. And then what we learned in the motions is that
7 that's based on user dbrody, but we also learned that there is
8 no UDID for each of those computer activity that is listed.

9 And so the fact that there is no UDID means it could be
10 someone else who got in to use the dbrody account.

11 As Mr. Vasiliou says in his declaration, the mere use of
12 an account does not identify the user. You can have shared
13 circumstances or someone could have obtained that, and he also
14 says that it's not uncommon in an intrusion case that multiple
15 accounts will be used during the course of an intrusion.

16 And so for that reason the other activity is unsupported
17 and it was misleading to say Brody did this when the only basis
18 is the use of the Brody account. It should have said: We
19 believe that it is the dbrody account and here is why we --

20 **THE COURT:** It could have said the Brody account.
21 That's true. It could have said that.

22 **MR. KROTOSKY:** Well, they could have said it but then
23 there is another step. As Mr. Vasiliou says, forensically the
24 mere use of an account does not identify the person.

25 And so it would have then flagged that issue and the

1 magistrate judge would have had an opportunity to address that.

2 With respect to the IP address, again, what we learned
3 from the telephone record is -- has no connection, you know,
4 with any activity. It doesn't show location. It doesn't show
5 that it's coming from the residence. It just shows activity;
6 however, the IP address also is inconsistent with the activity
7 that's alleged.

8 It says: This IP address was used before and after the
9 intrusion, and you would expect to see if it is associated with
10 the residence that it was also used, you know, during the
11 intrusion and that information, you know, is not, you know,
12 provided there.

13 I'm sorry, Your Honor --

14 (Pause in proceedings.)

15 **MR. KROTOSKY:** The other thing, Your Honor, with
16 respect to the *Franks* motion is that, as set forth in
17 paragraph 11, there is a registration process that occurs.

18 And so it has got to match either the device of an
19 iPhone 6 here, and it has got to match with another computer.

20 And what we have here is there are no UDIDs that apply,
21 you know, during the intrusion other than the one on
22 March 12th, which is inconsistent with the phone record; and we
23 also have no VPN log activity, which is another way to identify
24 access to the system.

25 And for those reasons, you know, we believe that the --

1 the requisite showing has been made and that the magistrate
2 judge, which presented an affidavit that did not in full candor
3 include additional information -- and, you know, one of the
4 things I wanted to mention is that, you know, when the affiant
5 mentions a particular fact like the UDID, candor is very
6 important.

7 If it is illustrative, it has to apply across the board.
8 And where they mention a UDID and it's, you know, on March 1 --
9 it proceeds the intrusion -- that lack of candor deprived the
10 magistrate judge of the information; and she was led to believe
11 that the -- it applied for each and every instance of the
12 computer accompanied activity. And the fact that it did not is
13 something that, you know, we believe should have been disclosed
14 in the search warrant.

15 **THE COURT:** All right.

16 **MR. KROTOSKY:** And then, Your Honor, with respect to
17 the duplicity motion.

18 **THE COURT:** Well, you are -- you hit your 15 minutes,
19 so give me a minute.

20 **MR. KROTOSKY:** Okay. Very good. Your Honor, we think
21 the controlling cases here are *Bonds*, *Bonnar* and *Newell*. Those
22 three cases deal -- show that distinct acts are involved, and
23 for that reason it's not an alternative means of proof.

24 In this instance we have distinct acts for different parts
25 of the network. We have the Terraform. We have the GitHub.

1 We have Ansible Tower. And we think that those three cases
2 very carefully reviewed it, and we believe that that applies.
3 And, you know, we will -- also as the Court considers the
4 unanimity.

5 Now, the Government is not opposed to a unanimity
6 instruction, you know, if the Court was inclined to view those
7 as distinct acts. We believe that they are, and we believe for
8 those reasons a unanimity instruction is required.

9 **THE COURT:** Okay, thank you. Mr. Hageman.

10 **MR. HAGEMAN:** Your Honor, if the Court would allow,
11 Ms. Harding will argue the first motion to suppress and then I
12 will --

13 **THE COURT:** I will allow Ms. Harding to argue, of
14 course.

15 **MR. HAGEMAN:** Thank you, Your Honor.

16 **MS. HARDING:** I will try to keep it brief. I just
17 have three responses to Mr. Krotosky's arguments on the motion
18 to suppress, none of which I think support that the Court
19 should reverse its tentative decision to deny the motion.

20 Mr. Krotosky talks about the IP address and takes great
21 issue with the fact that we didn't connect the IP address of
22 the residence to the network intrusion during the offense.

23 Just for the record, the affidavit does explain how --
24 through a network diagram, how Mr. Brody used internal IP
25 addresses associated with his laptop to access FRB's network

1 the night of the intrusion.

2 But more generally, this singular focus on the IP address
3 allegation overlooks the many other allegations that should be
4 considered under a totality analysis; the motive to commit the
5 crime because he thought he was unjustly fired, the opportunity
6 to commit the crime because he still had the Macbook, the logs
7 that showed his user name logging into the device or logging
8 into the system, rather, and the suspicious police report,
9 all -- even notwithstanding the IP address allegation --
10 support a fair inference that Mr. Brody was much more than a
11 mere suspect but that he, in fact, committed the network
12 intrusion.

13 And to that point, the 2002 -- 2022, rather, *Kvashuk* case
14 I think is on all fours here. I think that supports where
15 there is a computer-based crime searching other electronic
16 devices as the agents did here is reasonable, and it's also
17 reasonable to believe that people carry their personal
18 electronic devices in their homes.

19 In the *Kvashuk* case you will recall that the Defendant
20 even moved and moved homes since the Microsoft break-in, yet
21 there was still probable cause to believe that the Defendant
22 there took his devices with him.

23 On the particularity analysis, for the first time in
24 reply, I just want to briefly respond to the *Koh* case that is
25 cited in reply. That is distinguishable in my view because it

1 actually -- it actually talks about how none of the fourteen
2 categories of seizable documents were limited by any reference
3 to any criminal activity.

4 And there is -- that's not the case here. There was a
5 reference to the statute and the case law is good on that
6 point; that that's enough of an objective limiting factor.

7 And my last point is just on good faith. So Agent
8 Pritchard's affidavit, I think, supports that she was guided by
9 her own judgment, which the *Adjani* case supports, is one
10 consideration when looking at good faith.

11 And there were objective limiting factors in attachment B,
12 but the Agent's actions here also support they were guided by
13 objective limiting factors; were looking for evidence of the
14 crime; were time limited in their scope of the searches on
15 Mr. Brody's devices. So good faith is a second alternative
16 basis to denying the motion.

17 **THE COURT:** Okay. Thank you.

18 **MR. HAGEMAN:** Your Honor, turning to the *Franks* motion
19 and the arguments that the Defense just presented, I think the
20 Court hit the nail on the head. There is a standard here that
21 the Defense has to make a substantial preliminary showing of
22 both of these prongs, and they have failed to do so.

23 With respect to the U-D-I-D or UDID paragraph, the point
24 of that paragraph, as it states in the paragraph itself, is
25 that the multifactor authentication device and the user named

1 were tied together. The date and timestamp on the UDID
2 information, that doesn't change that fact. A UDID is a static
3 serial number -- like number. And so the exact date and time
4 does not matter.

5 So it is not a false or misleading statement. It is also
6 not intentionally or recklessly made. The fact that there was
7 a March 12th UDID printout that the affiant could have used,
8 I believe, speaks to the lack of intent or recklessness here.

9 He did not include it because it, frankly, doesn't matter.
10 The UDID printout is not the lynchpin that the Defense seems to
11 be characterizing it as. It is just one piece of the puzzle to
12 show that Mr. Brody had access.

13 If the UDID paragraph were the only paragraph in the
14 affidavit, perhaps, there would be a problem; but it's not the
15 only paragraph. There is many other paragraphs in there.

16 As for the subsequent computer activity paragraphs, I will
17 be very brief on that because it stems from the same acts as
18 the UDID.

19 Again, if that were the only paragraph -- excuse me, if
20 each paragraph were to be addressed individually standing on
21 its own, perhaps, there would be a problem; but an affidavit
22 should be read based on the totality of the circumstances.

23 So we have not only the UDID, which shows Mr. Brody's
24 ability to access the system. We also have the motive
25 established from his termination, his suspicious activity

1 regarding the Macbook afterwards, and all the other information
2 that in the totality of the circumstances viewing based on
3 common sense supports that Mr. Brody, Daniel Brody, is the
4 person between the dbrody user name.

5 And lastly with respect to the IP address, the Defense
6 said that it -- the information doesn't show that the network
7 intrusion is coming from the residence.

8 I believe there is substantial evidence in the affidavit
9 to support that the network intrusion happened from the
10 residence; but even if we were to take that out, the key
11 question is whether evidence of the crime is found at the
12 target residence. That's the question that matters.

13 And so even if the evidence doesn't support that the
14 intrusion is coming from the residence, there is still enough
15 to support probable cause that evidence would be found at the
16 residence.

17 The Apple printout shows, as the Court noted, repeated
18 activity from the 157 IP address associated with that
19 residence.

20 Turning to the duplicity motion, the Court -- the Defense
21 cited three cases. None of those cases are binding here. Two
22 of them are district court cases. One of them is an
23 out-of-circuit case.

24 I will focus on *Newell*, the out-of-circuit case from the
25 First Circuit. In that case the activity that was duplicitous

1 spanned one year, which is a far cry from what we have here,
2 which is over approximately 15 hours -- that happens to span
3 two days because it began late in the afternoon and continued
4 to the next morning -- all one course of conduct all against
5 the same victim.

6 This situation is entirely different from the *Newell* case.
7 These are different means to commit the same underlying
8 offense. The count is the same. The element is the same. The
9 mens rea is the same. The punishment is the same.

10 So long as the jury finds unanimously that the element has
11 been met, there is no duplicity problem. There is no need for
12 a specific unanimity instruction.

13 **THE COURT:** Thank you, Mr. Hageman. I will give you
14 two minutes, Mr. Krotosky, to say anything and then we will go
15 onto the next.

16 **MR. KROTOSKY:** Thank you, Your Honor. So with respect
17 to the motion to suppress, on the IP address. Again, there is
18 no connection during the FRB intrusion, and it is not
19 reasonable to assume the IP address, you know, what the
20 location is.

21 With respect to the other allegations, you know, at the
22 residence, again, this is one year earlier; and the cases
23 require a nexus or justification that's been -- I'm sorry --
24 specifically identified in other cases. That is missing here.

25 And he is a suspect. The fact that it is a computer-based

1 crime does not allow under the Fourth Amendment them to go in
2 one year later.

3 And with respect to the *Franks* issue, the UDID is a form
4 of authentication; and there are only two examples that are
5 provided. One is March 1 and one is March 12th.

6 It does not align with the Apple telephone record. That
7 is a big inconsistency and it should because it is the same
8 UDID on the Apple record.

9 Now, the fact that there are 44 other ones helps establish
10 the point that the Magistrate should have been told that those
11 times don't align and many of them occur within one minute.
12 There is, like, 10 or 12 within one minute, which suggests that
13 is an automatic refreshing that is going on.

14 More importantly, it does not correspond with the FRB
15 network. The subsequent computer activity, again, we know for
16 a fact there is no UDID, you know, for each of those, you know,
17 as well.

18 And then finally on the duplicity, we do believe that the
19 *Bonds* and *Bonnar* case do apply very similarly. Other district
20 courts confronting comparable situations have found there is
21 duplicity. With that, we would submit it.

22 **THE COURT:** Thank you. All right. Let's move on to
23 the motion to compel.

24 (Pause in proceedings.)

25 **THE COURT:** Let me just lay out sort of my background

1 context for how I'm thinking about this, and then I do have the
2 specific questions for you about a couple of these subpoenas.

3 In general, the Government has provided months ago the
4 documents that it intended to use from First Republic. First
5 Republic has provided 90 gigabytes of data.

6 In large part I agree with First Republic that the
7 requests are -- that are still outstanding are overbroad and
8 fail under the *Nixon* standard and I accept their responses that
9 state -- where they state that they have produced all of the
10 responsive documents. Most of the requests seem like sort of
11 quintessential fishing expeditions questions, but I do have
12 some specific questions.

13 So, first, with respect to subpoena number 1, request
14 number 2, which is the Apke network activity --

15 **MR. DAVIS:** Yes, Your Honor.

16 **THE COURT:** -- there are documents showing that --
17 showing people from First Republic Bank and Secret Service
18 Agents discussing material relating to the VPN.

19 The First Republic says that there is no VPN, but those
20 documents show them discussing something. So whatever -- it
21 seems to me that the Bank ought to produce anything that is
22 referred to in those documents especially those relating to
23 Mr. Apke's activities on March 11 and March 12.

24 **MR. DAVIS:** Yes, Your Honor. And just to clarify, our
25 position is not that the Bank did not have a VPN. It's that at

1 the time of the incident, the Bank did not have the VPN
2 configured in a way that the logs were being retained.

3 That has now since changed. The Bank is doing that. As
4 we have said multiple times in our responses, in our
5 opposition -- after the status conference, I e-mailed
6 Mr. Krotosky specifically to tell him this -- that there were
7 no logs -- no VPN logs at the time of the incident. We cannot
8 produce them because the Bank -- it was not the practice of the
9 Bank to retain VPN logs.

10 I do acknowledge that there are references in some of the
11 communications to the VPN. Many of them are mostly at the time
12 of the incident saying "here are examples of things that we
13 should try to retain." One of them being VPN logs.

14 They were saying, you know, we should look for these
15 things; but the fact of the matter is they did not find them
16 because at that time the Bank did not have VPN logs.

17 **THE COURT:** So are you saying that you have searched
18 for all of the documents that are referenced in the FRB and
19 Secret Service Agent communications and they don't exist?

20 **MR. DAVIS:** Absolutely, Your Honor, yes.

21 **THE COURT:** Okay. All right. Subpoena number 2,
22 request number 8, which relates to the GitHub servers.

23 **MR. DAVIS:** Yes, Your Honor.

24 **THE COURT:** Okay. So, have you produced -- it would
25 seem like the GitHub direct access logs could be produced from

1 GitHub. Has that been done?

2 **MR. DAVIS:** So for the GitHub access logs, Your Honor,
3 we did -- we produced the application logs. As to the access
4 logs, the issue here is that -- the way that the Bank uses
5 GitHub is a -- excuse me -- it is a -- it's an online
6 application. It is a black box to the Bank.

7 So, they don't have access to these things. These are
8 things that maybe could be obtained from GitHub. The way the
9 bank uses GitHub is the same way I use Gmail.

10 I'm not privy to the logs that an online application
11 retains because the Bank is a user of the service, and they
12 don't have -- we don't have anything beyond what we have
13 provided.

14 **THE COURT:** Okay. Subpoena 2, request number 15,
15 which is the Terraform Enterprise application logs.

16 **MR. DAVIS:** Yes, Your Honor.

17 **THE COURT:** Here you have indicated that you have
18 produced these documents. Is there an easy way for you to
19 point to the Defendant where those documents are?

20 **MR. DAVIS:** I believe we could identify the file path,
21 Your Honor.

22 **THE COURT:** Okay. I would like you to do that.

23 **MR. DAVIS:** Yes.

24 **THE COURT:** Subpoena 2, request number 19, which is
25 the Terraform administrative console and dashboard.

1 **MR. DAVIS:** Yes, Your Honor.

2 **THE COURT:** Where -- were these documents located on
3 the TFE server? And is the hash core support bundle on a
4 different server? It kind of looked like you might have been
5 talking -- you were ships passing in the night on this.

6 **MR. DAVIS:** So, we produced the entire Terraform
7 Enterprise server, which includes all of the aspects that the
8 Defense is requesting here. So --

9 **THE COURT:** So were the -- so there weren't documents
10 on the hash support bundle that were responsive to the request
11 then?

12 **MR. DAVIS:** That's correct, Your Honor.

13 **THE COURT:** Okay. And did you provide documents from
14 that hash core support bundle just so that I'm clear?

15 **MR. DAVIS:** I would have to look into that
16 specifically. What we produced was a large encrypted drive.
17 It is hard for me to say off the top of my head what's in
18 there.

19 All I can say at this moment is that in request to
20 subpoena 2, request 19, we produced the entire server including
21 the entire system logs. And that's what we have that is
22 responsive to that request.

23 **THE COURT:** Right, yeah. What I was thinking was that
24 the HashiCorp thing would -- support bundle was on a different
25 server. And so if it was on a different server, it's not

1 obvious to me that you did produce all the documents, but maybe
2 you did. I just don't know the answer to that.

3 **MR. DAVIS:** If we have them, we produced them.

4 **THE COURT:** You are saying that very confidently.

5 **MR. DAVIS:** I am very confident. I have gone through
6 this very many times with the client, and I'm very confident
7 that what we have that is responsive to these requests has been
8 produced and is in the encrypted drive.

9 **THE COURT:** Okay. And then finally subpoena 4,
10 request number 6, transmissions involving GitHub.

11 **MR. DAVIS:** Yes, Your Honor.

12 **THE COURT:** Here I'm wondering whether -- if the
13 records were produced did -- did you point the Defendant to the
14 wrong folder? What's the --

15 **MR. DAVIS:** No, I don't believe so. We provided
16 everything that we had, all the records that are related to the
17 damage to GitHub and the -- I don't believe that we
18 misidentified the folder name.

19 **THE COURT:** Okay. Mr. Krotosky, you have got 15
20 minutes. Tell me what's important.

21 **MR. KROTOSKY:** Okay. Thank you, Your Honor.

22 So on the motion to compel, this implicates Mr. Brody's
23 constitutional rights to prepare his defense as well as the
24 jury's right to consider evidence.

25 Now, I know there has been reference made to this

1 90-gigabyte hard drive. It doesn't matter if it is 5 or 10
2 terabytes. If it does not have the activity of Mr. Apke and
3 the other users on the network, then Mr. Brody cannot defend
4 Count Two, which is the transmission of a command program or
5 code.

6 Now, what has happened here is the Government did provide
7 what they had, but it was very limited. It was only on one
8 user, Mr. Brody. And in a network intrusion case, all network
9 activity is relevant with respect to the intrusion.

10 One of the questions we have been asking from the
11 beginning is how many users were on this network during the 17
12 hours that's alleged for the intrusion. We have never had an
13 answer for that, and we still don't know. We don't have the
14 records. Those records would provide a complete defense to
15 Mr. Brody.

16 Now, one of those users is Alex Apke, and we have
17 requested a number of his documents. He actually mentions in
18 his e-mail of March 12th, 2020, some gaps that need to be
19 followed up. And that's one of our requests that we made, and
20 we have never received that evidence.

21 That evidence -- because he says, for example, there is an
22 EFS function that overwrites commands. And he says (as read:)
23 "this is going to be difficult to obtain because of this
24 overriding of the commands."

25 And that's the whole point. We cannot defend a case that

1 alleges a transmission of a command, a program, a code or
2 information without that evidence. And those records would
3 provide a complete defense.

4 Now, Court was referring to the HashiCorp bundle, and that
5 is FRB record 001. There is two references in this document.
6 First of all, it is cut off. It is incomplete. It was printed
7 on August 29th, 2022.

8 We have requested a substitute copy and we were told "We
9 have given you what we have. We can't give you anything else."

10 If this is the state of it -- it also refers to two
11 bundles. Those bundles existed. And that goes to the heart of
12 the Court's question about the bundles. They existed because
13 they were transferred in this record.

14 We have requested those bundles in the subpoena that the
15 Court just alluded to as well as in subpoena number 1, request
16 number 1. Without those bundles, which we believe -- the date
17 says two years. We have also asked for clarification of the
18 date. Is it two years from the date of printing, August 29,
19 2020 or was it on March 12th, 2020?

20 We have asked and we have been given the same answer here.
21 "We gave you what we have. We can't tell you anything more.
22 So you have what we have and that's it."

23 This is going to be confusing and very -- you know, for
24 the jury on these types of issues; but more importantly, they
25 go to the opportunity to establish a complete defense for

1 Mr. Brody.

2 So the bundles requested in subpoena number 1, request
3 number 1, are essential. Without them, Mr. Brody is foreclosed
4 from -- from his defense in this case.

5 Now, it is more than his opportunity to prepare. The
6 cases that we cited say that a jury must consider the evidence
7 concerning these matters.

8 And if we don't have the answer, whether these things
9 exist or they do not, that does not allow the jury under the
10 Sixth Amendment to consider fairly the evidence.

11 Our view is that the limited collection of data by FRB and
12 by the Government only focused on one person. It is like
13 having a mansion as a house and they only went and looked at
14 the upper master bedroom. They disregarded the whole house.

15 And without knowing the crime scene, what happened in each
16 of the rooms where there were multiple people or users in, we
17 cannot defend this case.

18 And so it doesn't matter if it is 90 gigabytes or, you
19 know, 5 or 10 terabytes, without the evidence of the other
20 activity of the users and Mr. Apke, our defense, you know, is
21 foreclosed with respect to that.

22 The -- many of the other requests go to the user activity.
23 Now, each of the subpoenas was carefully focused on known
24 records; and one of those is what has been referred to the 29
25 computers and servers.

1 So, the subpoenas said: "Please produce all jump box
2 records and DevBox records." We didn't know how many there
3 were; however, on November 11th when we received the 90
4 gigabyte hard drive, we learned for the first time the names of
5 some of these matters.

6 And so we tried to meet and confer with Mr. Davis and he
7 said -- the first time they were available was on
8 November 29th. During that meeting, as we articulated in the
9 declaration and the attached e-mails to the motion requesting a
10 status conference, Mr. Davis said: "You have what we have. I
11 can't go through every single item."

12 So there was no opportunity. So why that's important,
13 there are 29 computer servers and other devices; and we only
14 have maybe five of them.

15 And so in that mansion we are forced to defend on one
16 bedroom, and in a network intrusion case we have very limited
17 evidence about the activity.

18 And so what happens is those 29 boxes, they go through a
19 series of jump boxes or DevBoxes and then they get to the
20 Terraform, Ansible Tower or GitHub. We don't have those
21 transmissions. And without that evidence, Mr. Brody cannot
22 defend himself on this.

23 Now, we know they exist because we found the names, and
24 that's when we -- when we said "give us all the jump boxes," we
25 assumed that's all we would get but we didn't. We got very

1 circumscribed evidence which has created a bias, misleading and
2 incomplete investigation in this case.

3 We believe the only place to go and get these network
4 records is FRB. And without them, Mr. Brody cannot fairly
5 defend himself in this matter.

6 We have articulated since July in the continuing
7 proceedings for Rule 17 the bases for each request. We have
8 identified with specificity each one, and we have given
9 specific examples in our filings as to the need here, and we
10 believe here that without the requested records, Mr. Brody will
11 not be able to fairly defend himself in this case.

12 **THE COURT:** Mr. Davis.

13 **MR. DAVIS:** Thank you, Your Honor.

14 First, I would like to just respond to the Defense's
15 argument about the limited nature the production.

16 For a lot of the things that we produced, it was not
17 limited to Mr. Brody. It was the home folders for the entire
18 server. We also produced entire servers.

19 But the fact of the matter is at the time of the incident,
20 the Bank performed an investigation. They determined that
21 Mr. Brody was the person who caused this incident, and they
22 retained all of the information that was related to him doing
23 that.

24 We did not receive a request to preserve information until
25 November 2021, twenty months after the incident, eight months

1 after this complaint was filed.

2 I believe Mr. Krotosky has been counsel of record since
3 April. He waited until November to send us a preservation
4 letter. We believe that that is because -- when we received
5 the letter was right after when the Bank generally ceases to
6 retain information. We believe Mr. Brody knows that, and
7 that's the reason they delayed in requesting us to retain
8 information.

9 As to the, you know, mansion metaphor, I think it is more
10 similar to on the way to the court today if on the highway a
11 car smashed into my car and we had all the evidence to prove it
12 but then the driver said: Well, what about the driving records
13 for every person on the highway that morning, it is just not
14 relevant. What we produced was related to this incident and
15 what shows that Mr. Brody is the person who committed this
16 crime.

17 As to the HashiCorp bundle and subpoena 1, request 1, as
18 we have said multiple times, we have produced everything we
19 have in response to subpoena 1, request 1.

20 If Mr. Krotosky believes that that is insufficient or that
21 there's gaps in that production, we can't change what we have.
22 It is up to him to make that argument in trial. We can't
23 produce more than what's accessible to the Bank.

24 In response to his argument about the 29 servers in boxes,
25 in our opposition we pointed out that the majority of these are

1 not servers or boxes. In their reply they said: "Oh, you are
2 quibbling with the term. They are computers," and they
3 submitted an expert declaration stating that. That's also
4 incorrect.

5 As we said in our opposition, a majority of these are
6 GitHub repositories of code, which are essentially text files.
7 There is no batch command history for a text file. We said
8 that in our opposition.

9 We keep telling them we have provided everything we have.
10 He is talking about DevBox, you know, service -- jump boxes.
11 We provided those. We provided what we have, and we are not
12 able to provide more than what was retained at the time of the
13 incident.

14 Overall with respect to the motion, Your Honor, it's the
15 Defendant's burden to show that the additional materials he is
16 seeking satisfy the relevancy, admissibility, and specificity
17 requirements under *U.S. v. Nixon*. And under the *U.S. v. Nixon*
18 decision if he fails to do so, his requests are unreasonable
19 and oppressive.

20 Defendant has not and cannot satisfy that burden because
21 Defendant is moving to compel First Republic Bank's compliance
22 with subpoenas that it has already fully complied with.

23 The Bank has repeatedly stated in its written responses
24 and in its motion papers that it has either produced all
25 accessible information in its possession or that it has nothing

1 responsive to produce.

2 Nevertheless, Defendant persisted in bringing this motion
3 seeking to compel the Bank to produce additional materials even
4 though the Bank has made it clear that there is nothing further
5 to produce.

6 Defendant cannot show that the additional materials
7 contained admissible evidence because the additional materials
8 either are not missing, as we showed in our opposition, or
9 Defendant is incorrect that the Bank failed to provide the
10 additional information because the Bank doesn't have additional
11 information.

12 It is not enough to hope or expect that the Bank has
13 additional relevant documents. The Defendant must know that
14 the documents exist and describe them specifically.

15 Defendant cannot know that additional materials exist
16 because the Bank doesn't have additional materials, and he has
17 also failed to describe them specifically.

18 Defendant's motion also improperly seeks to expand the
19 scope of the already extremely broad subpoenas by identifying
20 for the first time ever additional sources of information such
21 as these so-called 29 servers in boxes and by seeking responses
22 to further interrogatory style questions that are outside the
23 scope of a Rule 17 subpoena and for which the Bank has no legal
24 obligation to respond.

25 This effort to continually expand the scope of the

1 subpoenas is indicative of Defendant's strategy to create doubt
2 about the sufficiency of the Bank's production despite the fact
3 that the Bank has made every effort to provide all responsive
4 information.

5 The Bank did refuse to comply with a small portion of the
6 more than 900 requests independent subpoenas. For the nine
7 requests that seek irrelevant or privileged information, the
8 Bank has refused to provide responsive information.

9 Defendant apparently agrees with the Bank's position that
10 some of the requests seek irrelevant or privileged information
11 because he did not include four of those nine requests in his
12 motion to compel despite the fact that he is moving to compel
13 25 separate subpoena requests.

14 We believe Defense Counsel will never acknowledge that the
15 production is complete, so we are asking the Court to put an
16 end to this fishing expedition.

17 We have gone over Defendant subpoenas with the client many
18 times in exhausting detail. We have repeatedly met and
19 conferred with Defense Counsel far before November 29th, which
20 was what he just said was the first time we met and conferred.
21 That is not accurate.

22 Many Bank representatives have spent a tremendous amount
23 of time outside of their full-time jobs scouring the Bank's
24 systems to provide Defendant with the requested materials. The
25 Bank has no additional materials to provide. And accordingly,

1 we respectfully request that the Court deny Defendant's motion.

2 **THE COURT:** All right. So you can unequivocally
3 represent to me that First Republic has no other records
4 relating to Mr. Apke's activities on March 11th and 12th; that
5 everything that the Bank would have had has been -- or that the
6 Bank does have has been produced?

7 **MR. DAVIS:** Yes, Your Honor. And we produced
8 Mr. Apke's command history because that's one of the two things
9 that Mr. Krotosky raised at the status conference in addition
10 to the VPN logs.

11 So after the status conference, I worked with the client
12 to make sure we had nothing further to produce in either
13 category. We produced what we had with respect to Mr. Apke's
14 command logs, and we don't have VPN logs. I e-mailed him; told
15 him that. He even attached those e-mails to his motion. Yet,
16 he is still moving to compel us to produce additional materials
17 that the Bank does not have.

18 **THE COURT:** All right. Thank you. The Government is
19 not involved in this specific motion. Is there anything that
20 you wanted to add to the discussion before I go back to
21 Mr. Krotosky.

22 **MR. HAGEMAN:** We have nothing to add, Your Honor.

23 **THE COURT:** Mr. Krotosky.

24 **MR. KROTOSKY:** With respect to the command history,
25 they did produce something called a secure CRT of Mr. Apke. It

1 has many gaps. It is incomplete. So our request was for them
2 to answer: Is that all the command history that you have? If
3 so, just let us know. It sounds like the answer is yes, and we
4 will work with that; but it is incomplete. And the failure to
5 preserve that does interfere with Mr. Brody's constitutional
6 rights.

7 They mentioned preservation. Apples and oranges. There
8 is a preservation requirement as soon as a network intrusion
9 occurs to preserve the electronic records because of their
10 ephemeral nature. In fact, they are unable some weeks later --
11 before we even knew about this case -- to find essential
12 records.

13 Trying to determine if there was a litigation hold or some
14 other policy that applied or who decided where those records
15 went, like the bundle, that was there on whatever date that was
16 two years ago but now it's gone. Those are essential to
17 understand as part of his defense.

18 The preservation that we sent is -- we were working very
19 collaboratively with the prior Assistant U.S. Attorney, Leif
20 Dautch, who was seeking to obtain some of those records. And
21 when there was a delay and response that the records didn't
22 exist, as soon as we heard that, we sent the preservation,
23 which is part of the litigation process, but that's distinct
24 from the preservation requirements that apply within the days
25 and weeks, you know, following an intrusion.

1 With respect to the snapshot, it's missing the data. It
2 doesn't have the bundle, and that's why we need those bundles,
3 as the Court, you know, already alluded to. We looked. It's
4 not there.

5 Now, most of the responses are, you know, we gave them
6 what was related or relevant; but the FRB shouldn't be deciding
7 what is related or relevant. And we do not have user activity.
8 We still don't know how many users were on the network. That's
9 a very basic question whenever there is an intrusion. Who was
10 on there. Let's look at all their activity, and we still don't
11 have that information for, you know, many of the categories
12 that we have requested.

13 With respect to the so-called 29 servers in boxes, we
14 identified them by name after we received the 90 gigabyte hard
15 drive. And, you know, we expected that when we say "provide
16 the jump boxes, the DevBoxes, GitHub records," they would have
17 come. Then we noticed this discrepancy and the gaps in the
18 evidence.

19 And that raised the question particularly if we need to
20 establish what the transmission is and what the command, code,
21 program or information is.

22 So with respect to the Defendant's burden, normally the
23 regular order is that they would move to quash. They resisted
24 those efforts. We had no choice to come out of the regular
25 order because we want to get this evidence. And so that's, you

1 know, what we are forced to do in this matter. Very unusual,
2 but we do need the evidence and we are not getting it; and we
3 believe that Mr. Brody will not fairly be able to defend
4 himself in a network intrusion case without the network
5 intrusion records and without being able to analyze each
6 transmission as to where it originated from, where it went,
7 whether it was by a command, program code or information. And
8 because of that, you know, we believe that the records should
9 be produced. And we thank the Court for its consideration of
10 our motion.

11 **THE COURT:** Okay. Thank you.

12 **MR. DAVIS:** Thank you, Your Honor.

13 **THE COURT:** I will get an order out on these as soon
14 as I can. You are -- Mr. Krotosky, I think you have got the
15 documents that you have got. And for -- and so that's the case
16 that you are going to -- that -- you are going to have to shape
17 the case with those documents.

18 And the -- I will look again at a couple of these things
19 just to be confident, but if First Republic has made
20 unequivocal representations with respect to what it has and
21 what it can produce and the Government has made clear the
22 records that it has and has given them to you, and if that is
23 insufficient to give your client a fair trial, that's an issue
24 that I imagine I will hear about and others will hear about
25 later; but this is the -- this is the case that you have got,

1 and this is the case that is going to go forward.

2 **MR. KROTOSKY:** Yes, Your Honor. But the question is,
3 you know, well, they say: "We gave you what we have."

4 Normally, in the regular order, they say: "Well, here is the
5 Bates stamp. Here is the folder path."

6 **THE COURT:** Mr. Krotosky, the problem with this is
7 twofold I think. One, you supplied very broad requests and
8 insistent and ongoing requests for documents. And First
9 Republic, instead of at the first instance saying, "No, we need
10 to have this narrowed or we need to deal with something," they
11 decided that they were going to provide everything that they
12 could. It's -- it's a -- I don't know that it was a wise
13 choice but it was a choice. And that's what they did.

14 And now we are where we are and you are where you are.
15 And I don't -- I'm not going to fault either side. I'm just
16 saying we are going to trial and with -- with what we have got.
17 Okay.

18 So speaking of that, we -- does -- I'm curious whether the
19 Government -- and why don't we get Mr. Hageman and Ms. Harding
20 back up here.

21 **MR. HAGEMAN:** Yes, Your Honor.

22 **THE COURT:** I'm interested in what the Government's
23 expectation is with respect to time. How long do you think it
24 is going to put your case in chief in?

25 **MR. HAGEMAN:** May we have a moment, Your Honor.

1 **THE COURT:** Yeah, and I'm not going to hold you to it;
2 but I have got a trial schedule that -- starting towards the
3 end of March that is going to last for quite a long time. So I
4 really want to get a handle on how long I should be thinking
5 about for this case.

6 (Pause in proceedings.)

7 **MR. HAGEMAN:** Your Honor, our best estimate at this
8 point is a week to a week and a half for the Government's case
9 in chief, of course, depending on how long cross-examinations
10 take but that's our best estimate.

11 **THE COURT:** Sure. And, Mr. Krotosky, to the extent
12 that it's consistent with your client's interest, can you tell
13 me what I could expect for a Defense case.

14 **MR. KROTOSKY:** Yes, Your Honor, given the short
15 days -- and I know the Court has other hearings --

16 **THE COURT:** They seem long to me, so.

17 (Laughter)

18 **MR. KROTOSKY:** Yes, I appreciate that -- a week to
19 week and a half.

20 **THE COURT:** All right. Okay, that's helpful. So,
21 jury selection is on April 7th; and I'm sure that that will
22 work. I have got a trial that is starting March 27th, but that
23 case should be done in that week and certainly -- so, I might
24 have a jury out but that's -- we will do the selection on
25 April 7th.

1 The -- we will have a hearing couple of days before,
2 probably on the 5th to go over juror questionnaires and to see
3 whether the parties can agree to excuse any people who seem
4 to -- either for cause or hardship that the jury office didn't
5 see. So we will do that and we can do that by Zoom, I think.
6 It will be the easiest way to do it.

7 So tentatively I will set that on April 5th at
8 10:00 o'clock, and then we will have the pretrial conference on
9 March 13th.

10 And you should assume for purposes of that, that my
11 tentative stands will be the order. So assume that all the
12 Defense motions were denied. Assume that the -- that the
13 evidence is as has been produced thus far and then go forth
14 with whatever you are going to be filing on the time schedule
15 required.

16 **MR. HAGEMAN:** Yes, Your Honor.

17 **THE COURT:** Okay.

18 **MR. KROTOSKY:** Thank you, Your Honor.

19 **THE COURT:** All right. Thank you-all. I will look
20 forward to seeing you again and again.

21 **MR. HAGEMAN:** Thank you, Your Honor.

22 **MR. KROTOSKY:** Thank you, Your Honor.

23 **THE COURT:** Very good. Thank you.

24 (Proceedings adjourned at 10:58 a.m.)

25 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, February 24, 2023

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive style with a horizontal line underneath it.

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter